

Appeal No. SC99279

**In The
Supreme Court of Missouri
en banc**

CLIFTON JAMESON
Plaintiff/Appellant

vs.

ALEXIS STILL
Defendant/Respondent

Appeal from the Circuit Court of
St. Louis County, Missouri
Case No. 19SL-CC02508

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

I. Defendant Rejected Plaintiff's Settlement Offer

The trial court erred in granting Defendant's Motion for Summary Judgment, because there was no settlement agreement between the parties and Defendant was not entitled to judgment as a matter of law, in that there was no offer from Plaintiff capable of being accepted after Defendant's counteroffer, which constituted a rejection of Plaintiff's offer.

Missouri Common Law Requires Reversal

Contrary to the arguments presented by Defendant Alexis Still and her insurer, MetLife Auto & Home, Missouri's common law governing the formation of contracts applies. Under that law, which Defendant and MetLife have not disputed, Plaintiff Clifton Jameson's settlement was never validly accepted. Therefore, no settlement agreement was ever reached and the trial court erred in granting summary judgment for Defendant.

The facts in this case are simple. Plaintiff made a settlement offer. MetLife, Defendant's insurer, made a counteroffer. Under Missouri common law, the counteroffer constituted a rejection of Plaintiff's settlement offer. Defendant and MetLife do not contest that the rejection of Plaintiff's settlement offer would preclude them, under Missouri common law, from later accepting Plaintiff's offer. Consequently, if Missouri common law applies, it is clear there was never a valid acceptance of Plaintiff's offer, no settlement agreement

was ever reached between the parties, and the trial court erred in granting Defendant's Motion for Summary Judgment.

"The issue of whether the parties entered into an enforceable settlement agreement is governed by contract law." *Reppy v. Winters*, 351 S.W.3d 717, 720 (Mo.App.W.D. 2011). Defendant's only argument in support of summary judgment is that §§ 408.040 and 537.058 changed Missouri common law governing settlement offers and made Plaintiff's settlement offer "irrevocable." (**Substitute Brief of Respondent Alexis Still, p. 22**) (Sections 537.058 and 408.040 required Plaintiff's settlement offer "remain open for acceptance for ninety days, without exception." "[S]ettlement demands under Section 408.040 and 537.058 are not governed by the common law of contracts."). As discussed in more detail regarding Point Relied On II, neither the clear language of those sections nor the purpose of those sections supports Defendant's interpretation.

Following Plaintiff's Demand Letter to MetLife on May 20, 2019, offering to settle for \$150,000.00 or all available coverages (D13; D20; D30 p. 1 ¶ 2; App. A4), MetLife made a counteroffer of \$24,751.00 on June 21, 2019. (D30 p. 3 ¶ 3; App. A6; *see also* D13 p. 3; D15; D30 p. 1 ¶ 4; App. A4). "A counter-offer operates as a rejection of the original offer." *Payne v. E & B Carpet Cleaning, Inc.*, 896 S.W.2d 650, 651 (Mo.App.E.D. 1995). MetLife's counteroffer constituted a rejection of Plaintiff's settlement offer and terminated the power of MetLife or Defendant to accept Plaintiff's settlement offer. *Boehm v. Reed*, 14

S.W.3d 149, 151 (Mo.App.W.D. 2000). As a result, no valid settlement agreement between the parties ever arose.

Under contract law, which governs this case, MetLife rejected Plaintiff's settlement offer contained in the Demand Letter by making a counteroffer on June 21, 2019. Defendant and MetLife did not have the power to accept Plaintiff's settlement offer after making a counteroffer. Consequently, MetLife's eventual attempt to accept Plaintiff's settlement offer was ineffective and a settlement agreement between the parties was never created. The trial court erred in granting Defendant's Motion for Summary Judgment because Defendant failed to establish that she was entitled to judgment as a matter of law. This Court should reverse and remand with directions to proceed to a trial on the merits.

II. Sections 408.040 and 537.058 Did Not Mandate Plaintiff's Settlement Offer Remain Open

The trial court erred in granting Defendant's Motion for Summary Judgment, because there was no settlement agreement between the parties and Defendant was not entitled to judgment as a matter of law, in that §§ 408.040 and 537.058 did not mandate that Plaintiff's settlement offer remain open for acceptance following Defendant's counteroffer.

A. The Rules of Statutory Interpretation

Under contract law, MetLife's counteroffer constituted a rejection of Plaintiff's settlement offer contained in the Demand Letter. Contrary to Defendant's arguments, §§ 408.040 and 537.058 did not change the common law. Consequently, there was never a valid acceptance of Plaintiff's offer, no settlement agreement was ever reached between the parties, and the trial court erred in granting Defendant's Motion for Summary Judgment.

"Words in a statute are not read in isolation but, rather, are read in the context of the statute to determine their plain and ordinary meaning." *Kehlenbrink v. Dir. of Revenue*, 577 S.W.3d 798, 800 (Mo.banc 2019). "In determining the meaning of a word in a statute, the Court will not look at any one portion of the statute in isolation. Rather, it will look at the word's usage in the context of the entire statute to determine its plain meaning." *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 122 (Mo.banc 2014). "Each word, clause, sentence, and section of a statute is given meaning. [Citation omitted]. No portion of a

statute is read in isolation, but rather is read in context to the entire statute, harmonizing all provisions.” *Util. Serv. Co. v. Dep’t of Labor & Indus. Rels.*, 331 S.W.3d 654, 658 (Mo.banc 2011).

Despite the clear rules regarding statutory interpretation, Defendant and MetLife focus solely on the words “shall” and “must” rather than how the ninety-day requirements work within the context of each section. Defendant repeatedly quotes § 408.040 as stating that an offer under that section “must ... be left open for ninety days.” However, Defendant and MetLife ignore the one hundred forty-eight (148) words that appear between “must” and “be left open for ninety days” in § 408.040. As discussed in more detail below, they also ignore that the ninety-day requirement in both sections is found in a list of items to be included in a settlement offer under those sections. § 408.040.3(1)-(4) RSMo; § 537.058.2(1)-(8) RSMo.

Neither § 408.040 nor § 537.058 states that a settlement offer pursuant to their terms is irrevocable. If the legislature intended to make offers under those sections irrevocable, it would be more reasonable to specifically state that such an offer is irrevocable in a separate subsection. The requirement that the party making the offer say it will be left open for ninety days does not make the offer irrevocable.

Section 408.040 provides: “In order to qualify as a demand or offer pursuant to this section, such demand must[, among other things,] [r]eference this section and be left open for ninety days.” § 408.040.3(4). Likewise, § 537.058 requires, among multiple other things, that the

time-limited demand “contain the following material terms: (1) The time period within which the offer shall remain open for acceptance by the tort-feasor’s liability insurer, which shall not be less than ninety days from the date such demand is received by the liability insurer[.]” § 537.058.2(1) RSMo.

Effectively, those sections required Plaintiff’s offer to include a term, as was included in the Demand Letter, stating: “This offer to settle will remain open for ninety (90) days from the date of MetLife Insurance Company’s receipt of this offer.” (D13 p. 2; D30 p. 1 ¶ 3; App. A4). Inclusion of that sentence meets the requirements of §§ 408.040.3(4) and 537.058.2(1). However, the inclusion of that sentence in a settlement offer does not make the offer irrevocable.

A plaintiff could send a settlement offer, without referencing or otherwise attempting to comply with either § 408.040 or § 537.058, stating: “This offer to settle will remain open for ninety (90) days from the date of your receipt of this offer.” Despite the statement that the offer would remain open for ninety days, the plaintiff could revoke the settlement offer at any time before acceptance. Similarly, a rejection or counteroffer by the defendant would terminate the power of acceptance prior to the expiration of the ninety-day period. “Under the law of contracts, the continuing power of acceptance created by an offer may be terminated in a variety of ways including acceptance, *rejection*, lapse of time, *revocation* or death or incapacity of either party.” *Boehm v. Reed*, 14 S.W.3d 149, 151 (Mo.App.W.D. 2000) (emphasis added). “A

counter-offer operates as a rejection of the original offer.” *Payne*, 896 S.W.2d at 651.

In other words, the fact that a settlement offer states it will remain open for ninety days, which is all the statutes require, does not make the offer irrevocable. The legislature knew this when it drafted §§ 408.040 and 537.058. The legislature could have stated that an offer under either of those sections is irrevocable. The legislature could have specified that a counteroffer does not constitute a rejection of the original offer under either of those sections. The legislature could have granted an insurer the right to accept the settlement offer at any time during the 90-day period. It did not do any of those things. Instead, the legislature required the offer state it would remain open for 90 days knowing that under the common law the period for acceptance would terminate early if the offer was rejected by counteroffer or otherwise.

A statement that an offer will be left open for a set period is not an agreement that the offer is irrevocable. Instead, it is a limit on the time within which the other party can accept and is subject to early termination by rejection or revocation under common-law rules. The ninety-day requirements in §§ 408.040 and 537.058 are a limit of a party’s ability to limit the time for acceptance but does not change the fundamental rules governing offer, acceptance, rejection, or revocation with respect to settlement offers.

Additionally, Defendant’s interpretation of §§ 408.040 and 537.058 would make other significant changes to the law governing settlement negotiations. Defendant argues that those sections require an offer

remain open for acceptance for ninety days. However, acceptance terminates the power of acceptance. Consequently, Defendant's interpretation would not only prevent a plaintiff from revoking an offer, eliminate any incentive for the defendant's insurer to make significant counteroffers, and keep the offer open despite the plaintiff's death, but would also preclude acceptance until the ninetieth day. There is no indication that the legislature intended such significant and unreasonable changes to the law governing the formation of settlement agreements and this Court "must avoid interpretations that are unjust, absurd, or unreasonable." *Edwards v. City of Ellisville*, 426 S.W.3d 644, 663 (Mo.App.E.D. 2013) (citations and internal quotation marks omitted).

Under the rules of statutory interpretation, neither § 408.040 nor § 537.058 mandate that a plaintiff's settlement offer remain open for acceptance after a defendant or a defendant's insurer rejects the settlement offer. The statutory purpose of § 408.040.3 is to establish the amount of post judgment interest and when prejudgment interest is allowed in tort actions. Section 537.058 addresses when evidence of an opportunity to settle is admissible in an action for "extra-contractual damages against the tort-feasor's liability insurer." § 537.058.7 RSMo. Neither section is intended to govern the creation of a settlement agreement. That issue is governed by contract law and, as discussed regarding Point I, under that law, Defendant and MetLife did not have the power to accept Plaintiff's settlement offer after making a counteroffer on June 21, 2019. Consequently, MetLife's attempt to

accept Plaintiff's settlement offer after June 21, 2019, was ineffective and a settlement agreement between the parties was never created. The trial court erred in granting Defendant's Motion for Summary Judgment.

B. Section 408.040 Did Not Change Missouri Common Law

Section 408.040 governs interest on judgments and provides an exception to the general rule that prejudgment interest is not allowed in tort cases. *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 449 (Mo.banc 1998). Section 408.040.3 provides a list of items that must be included in a settlement offer in order to qualify for prejudgment interest.

In order to qualify as a demand or offer pursuant to this section, *such demand must:*

- (1) *Be in writing and sent by certified mail return receipt requested; and*
- (2) *Be accompanied by an affidavit of the claimant ...; and*
- (3) For wrongful death, personal injury, and bodily injury claims, *be accompanied by a list of the names and addresses of medical providers ..., copies of all reasonably available medical bills, a list of employers ..., and written authorizations* sufficient to allow the party ... to obtain records from all employers and medical care providers; and
- (4) *Reference this section and be left open for ninety days.*

§ 408.040.3 RSMo (emphasis added).

“In matters of statutory interpretation, this Court's role is to ascertain the intent of the legislature from the language used and to consider the words used in their ordinary meaning.” *Macon County Emergency Services Board v. Macon County Commission*, 485 S.W.3d

353, 355 (Mo.banc 2016) (citations omitted). The intent of § 408.040 is to establish when a plaintiff in a tort action can recover prejudgment interest. Nothing in this section indicates any intent to change the rules governing contract formation. Defendant conflates the fact that this section is in derogation of the common law *regarding prejudgment interest* with the issue of whether this section was intended to change the common law rules regarding acceptance and rejection of settlement offers.

Determining the legislative intent regarding § 408.040 requires examination of how that section applies in various situations. If a claimant asserts a demand that fails to include one of the listed requirements in subsection 3, the result is that the claimant will not be entitled to prejudgment interest. However, the demand would still be a valid settlement offer and the tortfeasor or insurer would be entitled to accept the settlement offer. Failure to comply with § 408.040 would not invalidate the settlement offer or preclude the parties from reaching a valid settlement agreement. Section 408.040 does not replace the common law regarding settlements.

Likewise, a settlement offer that references § 408.040 and includes all the other requirements of subsection 3 but states that it will be left open for 45 days, not 90, is still a valid settlement offer. The claimant would not be entitled to prejudgment interest, but the tortfeasor or insurer could still accept the offer and a valid settlement could be reached.

Defendant argues that “settlement demands under Section [sic] 408.040 and 537.058 are not governed by the common law of contracts.” (Substitute Brief of Alexis Still, p. 22). Under that argument, a claimant’s failure to comply with the requirements of subsection 3 of § 408.040 would invalidate the settlement offer as well as preclude prejudgment interest. If a demand under those sections “is a creation of the General Assembly, and not of contract law” (Substitute Brief of Alexis Still, p. 22), then an offer that does not comply with those requirements is invalid and cannot be accepted by the tortfeasor or insurer. Suddenly, the penalty for failure to meet the requirements of § 408.040 is not only the potential loss of prejudgment interest, but also the possibility of the invalidation of the settlement agreement if the insurer attempts to accept the defective settlement offer.

Defendant incorrectly argues that its interpretation of § 408.040 encourages settlements. (Substitute Brief of Alexis Still, p. 12). In fact, settlement negotiations are discouraged by reducing a claimant’s ability to negotiate. If a claimant’s settlement offer under § 408.040 is irrevocable for 90 days, as Defendant repeatedly argues, then the claimant has no incentive to make other offers during that time and an insurer has no incentive to make any counteroffers close to the amount of the original offer. Instead, the insurer is encouraged to make low offers knowing that it can always accept the original offer on the 90th day. The claimant is encouraged not to accept a low offer or make any counteroffer to the counteroffer because there is a possibility that the original offer will be accepted on the 90th day.

The common law rule treating a counteroffer as a rejection encourages an insurer to either accept the original offer or make a *reasonable* counteroffer. A reasonable counteroffer encourages a claimant to negotiate because prejudgment interest will not begin until 90 days from the date the original offer was received by the insurer.

Additionally, § 408.040 does not state that a settlement offer under that section is irrevocable for 90 days. Consequently, a claimant can revoke a settlement offer before the 90 days expire and before the offer is accepted. Of course, the claimant would not be entitled to prejudgment interest but the tortfeasor or insurer could not accept the offer after the offer is revoked.

Subsection 3 of § 408.040 lists the requirements for making a demand that qualifies for prejudgment interest. § 408.040.3 RSMo (“In order to qualify as a demand or offer pursuant to this section, such demand must”). Once a claimant makes a demand that complies with those requirements, including referencing § 408.040 and stating that the offer will “be left open for ninety days”, the claimant has complied with the requirements for obtaining prejudgment interest. If the claimant revokes the offer before the 90 days expire, the claimant has changed her position and is no longer entitled to prejudgment interest. Otherwise, the tortfeasor and insurer have the *option* to accept or reject the offer at any time during the 90 days. If the offer is accepted, a settlement agreement exists and the requirements of § 408.040 no longer matter because prejudgment interest is irrelevant. However, once the offer is rejected, either directly or by the making of a

counteroffer, it is the tortfeasor and insurer that have made the decision to end their ability to later accept the offer. The only question that remains is whether the claimant complied with § 408.040 and is entitled to prejudgment interest.

The purpose of § 408.040 is to determine when a claimant is entitled to prejudgment interest. The legislature did not intent to make radical changes to the common law rules governing the formation of settlement agreements. “The issue of whether the parties entered into an enforceable settlement agreement is governed by contract law.” *Reppy*, 351 S.W.3d at 720.

Further, contrary to Defendant’s argument, the interest provision in § 408.040 recognizes that a counteroffer operates as a rejection of the offer. The statute provides that prejudgment interest is allowed starting on the earlier of “a date ninety days after the demand or offer was received ... or from the date the demand or offer was rejected without counter offer[.]” § 408.040.3 RSMo. Allowing interest to begin to run once an offer is rejected without a counteroffer would be illogical if, as Defendant argued, “notwithstanding a counter-offer or a rejection, the demand was open for acceptance within the ninety (90) day period.” (D9 p. 3). The allowance of prejudgment interest once an offer is rejected without a counteroffer recognizes the termination of the offer when it has been rejected. It also recognizes that a counteroffer is still a rejection since an offer can be “rejected without counter offer”. § 408.040.3 RSMo.

Contrary to Defendant and MetLife’s argument, the 2005 amendments to § 408.040 did not change the common law rules governing contract formation. The deletion, in 2005, of the words “unless rejected earlier” does not express the intent Defendant and MetLife wish to attribute to it. The legislature did not simply remove those three words. Instead, the legislature removed the entire sentence, containing 26 words, and inserted in its place multiple sentences and subparagraphs containing over 280 words. 2005 Mo. Legis. Serv. H.B. 393; (App. A17-A18). The legislature added multiple requirements that must be included in a “demand for payment” or “offer of settlement” in order to qualify for prejudgment interest and significantly changed the structure of then subsection 2 of § 408.040. Consequently, the fact that one of the deleted phrases from the prior version of § 408.040 included the words “unless rejected earlier” does not clearly indicate a legislative intent to make sweeping changes to the law of contracts which governs settlement agreements. “Unless a statute clearly abrogates the common law either expressly or by necessary implication, the common law rule remains valid.” *State ex rel. Brown v. III Investments, Inc.*, 80 S.W.3d 855, 860 (Mo.App.W.D. 2002) (citation and internal quotation marks omitted).

Finally, Defendant’s interpretation would add language to § 408.040 making an offer under that section irrevocable and allowing a defendant or her insurer to accept an offer for the full 90 days even if previously rejected. This Court cannot add that language to § 537.058. *Emery*, 976 S.W.2d at 449. As explained by the Court in *Amedisys, Inc.*

v. Kingwood Home Health Care, LLC, 437 S.W.3d 507, 513 (Tex. 2014), when addressing a similar argument, if the issue were whether Plaintiff was entitled to prejudgment interest, § 408.040 would govern. However, the issue is whether a settlement was agreed to by the parties, i.e. whether MetLife had the power to accept Plaintiff's settlement offer after having previously rejected that offer. Contract law governs that issue. Section 408.040 does not address the issue involved in this case.

Section 408.040 does not require that a settlement offer remain open after being rejected. Consequently, the trial court erred in granting Defendant's Motion for Summary Judgment and this Court should reverse the trial court's Full and Final Judgment.

C. Section 537.058 Did Not Change Missouri Common Law

Section 537.058 provides the requirements for a "time-limited demand" in order for such a demand to "be considered as a reasonable opportunity to settle" and be admissible in an action seeking "extra-contractual damages" against the liability insurer. § 537.058.7 RSMo. Nothing in § 537.058 indicates an intent to change the rules governing contract formation or the impact of a rejection or counteroffer.

As with § 408.040, determining the legislative intent regarding § 537.058 requires examination of how that section applies in various situations. If a claimant asserts a demand that fails to meet one of the requirements in subsection 2, the result is that the demand "shall not be considered as a reasonable opportunity to settle for the insurer and shall not be admissible in any lawsuit alleging extra-contractual damages against the tort-feasor's liability insurer." § 537.058.7 RSMo.

However, the demand would still be a valid settlement offer and the tortfeasor's insurer would be entitled to accept the settlement offer. Failure to comply with § 537.058 would not invalidate the settlement offer or preclude the parties from reaching a valid settlement agreement. Section 537.058 does not replace the common law regarding settlements.

Likewise, a settlement offer that references § 537.058 and meets all the other requirements of subsection 2 but states that it will be left open for 45 days, not 90, is still a valid settlement offer. Of course, the demand would not be admissible in an action for extra-contractual damages, but the tortfeasor or insurer could still accept the offer and a valid settlement could be reached.

Defendant argues that § 537.058 replaces the common law. (Substitute Brief of Alexis Still, p. 22). Under that argument, a claimant's failure to comply with the requirements of subsection 2 of § 537.058 would invalidate the settlement offer as well as preclude admission of the demand in an action for extra-contractual damages. Suddenly, the penalty for failure to meet the requirements of § 537.058 is not only the potential exclusion of evidence of the demand, but also the possibility of the invalidation of the settlement agreement if the insurer attempts to accept the defective settlement offer.

Additionally, § 537.058 does not state that a settlement offer under that section is irrevocable for 90 days. Defendant asserts that the wording of § 537.058 "expresses its objective to make time-limited settlement demands irrevocable and not subject to any exception during

the ninety-day acceptance period, including the common-law rule that deems a counteroffer the rejection of an offer.” (Substitute Brief of Alexis Still, p. 18). Defendant’s interpretation impermissibly adds words to the statute. “A court may not add words by implication to a statute that is clear and unambiguous.” *Emery*, 976 S.W.2d at 449.

Consequently, a claimant can revoke a settlement offer before the 90 days expire and before the offer is accepted. Of course, the demand would not be admissible in an action for extra-contractual damages but the tortfeasor’s insurer could not accept the offer after the offer is revoked.

Subsection 2 of § 537.058 provides the requirements for making a demand that will be admissible in an action for extra-contractual damages. § 537.058.2 RSMo. Once a claimant makes a demand in compliance with § 537.058, the claimant has met the requirements for making the demand admissible in a subsequent action for extra-contractual damages. If the claimant revokes the offer before the 90 days expire, the claimant has changed her position and the demand is no longer admissible. Otherwise, the tortfeasor’s insurer has the *option* to accept or reject the offer at any time during the 90 days. If the offer is accepted, a settlement agreement exists and the requirements of § 537.058 no longer matter because there will be no claim for extra-contractual damages. However, once the offer is rejected, either directly or by the making of a counteroffer, it is the tortfeasor’s insurer that made the decision to end its ability to later accept the offer. The only

question that remains is whether the demand is admissible in an action for extra-contractual damages.

The purpose of § 537.058 is to determine when a time-limited demand is admissible in an action for extra-contractual damages. The legislature did not intent to make radical changes to the common law rules governing the formation of settlement agreements. “The issue of whether the parties entered into an enforceable settlement agreement is governed by contract law.” *Reppy*, 351 S.W.3d at 720.

Finally, Defendant’s interpretation would add language to § 537.058 making an offer under that section irrevocable and allowing a tortfeasor’s insurer to accept an offer for the full 90 days even if previously rejected. This Court cannot add that language to § 537.058. *Emery*, 976 S.W.2d at 449.

Section 537.058 did not change contract law or require that a settlement offer remain open after being rejected. Consequently, the trial court erred in granting Defendant’s Motion for Summary Judgment and this Court should reverse the trial court’s Full and Final Judgment.

D. Defendant's Cases From Other States Do Not Support Her Interpretation

Defendant's reliance on cases from other states is misplaced as those cases involve differently worded provisions. In *Poster v. Southern Cal. Rapid Transit Dist.*, 801 P.2d 1072 (Cal. 1990), the Court addressed a statute which provided: "If the offer is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn...." *Poster*, 801 P.2d at 1074 (quoting Code of Civil Procedure § 998(b)(2)). The Court concluded that under that section, an offer was not revoked by a counteroffer but could be revoked by the offeror. *Poster*, 801 P.2d at 1075.

The statute in *Poster* addressed when an offer was "deemed withdrawn." In contrast, §§ 408.040 and 537.058 both address what must be include in a settlement offer. The California statute provided a single condition under which the offer was "deemed withdrawn", implying that the offer was not deemed withdrawn under other circumstances. In contrast, neither § 408.040 nor § 537.058 specify conditions under which a settlement offer is deemed revoked. Consequently, those sections do not change the common law governing contract formation.

Similarly in *Scope v. Fannelli*, 639 So.2d 141 (Fla.App. 1994), the Court addressed a statute governing settlement offers that provided, in part: "An offer may be withdrawn in writing which is served before the date a written acceptance is filed." *Scope*, 639 So.2d at 142 (quoting § 768.79, Florida Statutes (1993)). In response to the argument that a

counteroffer terminated an earlier offer under the Florida statute, the Court held:

Under section 768.79, an offer is irrevocable for a period of 30 days unless the offeror in writing serves a notice of withdrawal to the offeree before the offeree's written acceptance is filed. § 768.79(5). No alternative method of reducing the time for acceptance is provided by the statute. A rule of statutory construction applicable here is ... the mention of one thing generally implies the exclusion of another.

Scope, 639 So.2d at 143 (citations and internal quotation marks omitted).

Again, the Florida statute provided a single method for withdrawing an offer. In contrast, §§ 408.040 and 537.058 do not specify any method for revoking an offer or specify the consequences of a rejection or counteroffer. Consequently, those sections do not displace the common law governing contract formation.

The plain language of §§ 408.040 and 537.058 do not show any intent to change contract law or require that a settlement offer remain open after being rejected. Consequently, the trial court erred in granting Defendant's Motion for Summary Judgment. This Court should reverse the trial court's Full and Final Judgment and remand for a trial on the merits.

III. In the Alternative, Judgment Was Improper On the Executory Settlement Agreement

In the alternative, the trial court erred in entering judgment in favor of Defendant, because, if a settlement agreement exists, the trial court failed to enforce the settlement agreement prior to entering judgment for Defendant on Plaintiff's claim, in that Defendant's Motion for Summary Judgment sought enforcement of an alleged executory settlement agreement between the parties and Defendant is not entitled to judgment until after the parties have performed the settlement.

The Trial Court Failed to Enforce the Alleged Settlement Agreement

If this Court finds a settlement agreement does exist, the trial court erred by failing to enforce the settlement agreement prior to entering a final judgment. In that situation, this Court should reverse and remand with instructions to enter an order enforcing the settlement agreement and reserving judgment until the settlement has been performed.

"A motion to compel settlement adds to a pending action a collateral action for specific performance of the settlement agreement." *Beck v. Shrum*, 18 S.W.3d 8, 10 (Mo.App.E.D. 2000). The Court in *Ingram v. Rinehart*, 108 S.W.3d 783 (Mo.App.W.D. 2003), explained that a defendant is limited to equitable relief, i.e. enforcement of the settlement agreement, where the settlement upon which she relies is executory. *Ingram*, 108 S.W.3d at 789. An executory settlement agreement simply suspends the original claim and precludes the plaintiff from proceeding on the original claim as long as the defendant has not breached the agreement. *Ingram*, 108 S.W.3d at 790. The

plaintiff's claim is only suspended because "if a defendant refuses to comply with the terms of a settlement, in whole or in part, the plaintiff may elect to enforce the settlement or abandon the settlement and proceed under the original cause of action." *Ingram*, 108 S.W.3d at 790.

Consequently, "where the settlement agreement remains executory, the accord can be enforced in equity by a motion to enforce or an action for specific performance but cannot be set up as an affirmative bar at law to the original claim." *Ingram*, 108 S.W.3d at 791. Otherwise, if the "accord executory" is treated as a defense at law, "the result would be a defendant's verdict on the plaintiff's primary claim with no concomitant order to effectuate the settlement by execution of documents or performance (e.g., payment of money)." *Ingram*, 108 S.W.3d at 791.

The trial court in the present case erred by entering judgment in favor of Defendant on Plaintiff's claims without any concomitant order for Defendant to pay the amount owed under the alleged settlement. Such judgment was improper because Plaintiff's claims are only suspended until such time as the settlement is completed.

Consequently, the issue in this case is not whether the alleged settlement agreement requires court approval. The issue is that Defendant is not entitled to judgment on Plaintiff's claims based on an "accord executory." Defendant failed to show she was entitled to judgment as a matter of law because the alleged settlement upon which she relies has not been completed.

Further, it was not Plaintiff's obligation to request affirmative relief regarding the alleged settlement agreement. Defendant was the party

seeking to enforce the alleged settlement agreement. Plaintiff was not required to ask for specific performance in the trial court. Defendant was claiming a settlement agreement existed and, thus, seeking specific performance of the settlement. “A motion to compel settlement adds to a pending action a collateral action for specific performance of the settlement agreement.” *Beck*, 18 S.W.3d at 10.

If this Court finds a settlement agreement exists between the parties, the trial court erred in granting judgment in favor of Defendant without first enforcing the alleged settlement agreement. Even if a settlement agreement exists, Defendant is not entitled to judgment on Plaintiff’s claims until the parties have performed the terms of the settlement and the trial court’s Full and Final Judgment should be reversed.

CONCLUSION

The ninety-day requirements in §§ 408.04 and 537.058 are included in a list of items Plaintiff was required to include in her Demand Letter. She met that requirement by stating: “This offer to settle will remain open for ninety (90) days from the date of MetLife Insurance Company’s receipt of this offer.” (D13 p. 2; D30 p. 1 ¶ 3; App. A4). Requiring Plaintiff to include that statement in her Demand Letter did not change the common law governing the formation of settlement agreements or make her settlement offer irrevocable. The legislature could easily have stated that an offer under either section is irrevocable. It did not. Including the ninety-day requirement in the list of items to be included in the offer does not show an intent to make the offer irrevocable.

MetLife made a counteroffer to Plaintiff on June 21, 2019. That counteroffer constituted a rejection of Plaintiff’s offer contained in the Demand Letter. Consequently, Defendant and MetLife did not have the power to accept Plaintiff’s offer after June 21, 2019, and no settlement agreement between the parties was ever created. Sections 408.040 and 537.058 did not change contract law or require that Plaintiff’s settlement offer remain open even after being rejected by MetLife. The trial court erred in granting Defendant’s Motion for Summary Judgment and this Court should reverse the Full and Final Judgment and remand for a trial on the merits.

Respectfully Submitted,

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RULE 84.06(c) CERTIFICATE

I certify that this Appellant's Substitute Reply Brief complies with the limitations contained in Supreme Court Rule 84.06(b), that the entire brief contains 6,187 words, and that this Appellant's Substitute Reply Brief was served pursuant to Rule 103.08.

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